No. 07-1150

In the Supreme Court of the United States

KATHLEEN HAWK SAWYER, ET AL.,
PETITIONERS

v.

JAVAID IQBAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONSE OF JOHN ASHCROFT AND ROBERT MUELLER TO CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED

Whether conclusory allegations of tortious conduct by supervisory government officials can be maintained under 42 U.S.C. 1985(3) where the same allegations, arising from the same underlying conduct, have been found insufficient to survive dismissal when pleaded directly under the relevant constitutional provisions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-70a) is reported at 490 F.3d 143.[1] The order of the district court (Pet. App. 71a-150a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 2007. Petitions for rehearing were denied on September 18, 2007 (Pet. App. 151a-152a). On December 7, 2007, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to January 16, 2008. On January 4, 2008, Justice Ginsburg further extended that

[1] As in the cross-petition, references to "Pet. App." are to the appendix to the petition for a writ of certiorari in *Ashcroft* v. *Iqbal*, No. 07-1015 (filed Feb. 6, 2008).

time to February 6, 2008. The petition for a writ of certiorari in No. 07-1015 was filed on February 6, 2008. The conditional cross-petition for a writ of certiorari was filed on March 7, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves civil claims brought by Javaid Iqbal (plaintiff), a citizen of Pakistan who was arrested by federal officials in New York City following the September 11, 2001 terrorist attacks and detained at the Metropolitan Detention Center (MDC) in Brooklyn pending trial on criminal charges. See Pet. App. 3a-4a.[2]

In the underlying petition, *Aschroft* v. *Iqbal*, No. 07-1015 (filed Feb. 6, 2008), petitioners John D. Ashcroft, former Attorney General of the United States, and Robert Mueller, Director of the Federal Bureau of Investigation, seek this Court's review of the questions (1) whether conclusory allegations that a cabinet-level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); and (2) whether a cabinet-level official or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly

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[2] The complaint was filed by two plaintiffs: Iqbal and Ehab Elmaghraby. See Pet. App. 154a. Elmaghraby settled his claims, and the district court entered an order of voluntary dismissal in February 2006. In describing the history of the case, we address only those claims brought by Iqbal.

carried out by such subordinate officials. The court of appeals held that plaintiff's allegations were sufficient to state a valid claim against several defendants (including Ashcroft and Mueller) for racial or religious discrimination, as well as for conspiracy to commit such discrimination. Pet. App. 58a-63a, 65a.

2. The conditional cross-petition was filed by defendants Kathleen Hawk Sawyer, Michael Cooksey, and David Rardin, who were, at the relevant time, the Director of the Federal Bureau of Prisons, the Assistant Director for Correctional Programs of the Bureau of Prisons, and the Director of the Northeast Region of the Bureau of Prisons, respectively. Pet. App. 157a-158a. Plaintiff alleges that Sawyer and Rardin were "responsible for the custody, care and control of the individuals detained in the MDC, including Plaintiff[]," and that Cooksey was "responsible for ensuring a safe and secure institutional environment for" those individuals. *Ibid.* Plaintiff alleges that all three cross-petitioners were "instrumental in the adoption, promulgation, and implementation of the policies and practices challenged" and that they "authorized, condoned, and/or ratified the unreasonable and excessively harsh conditions" to which he claims he was subjected. *Ibid.*; see also *id.* at 190a-191a (including cross-petitioners among the defendants who allegedly "were aware of, approved of, and willfully and maliciously created these unlawful conditions of confinement").

In addition to those general allegations, plaintiff's complaint asserts a number of specific allegations against cross-petitioners. He alleges that "post-September 11th detainees [at the MDC] were not afforded any hearings" and "remained under restrictive detention in the [Administrative Maximum Special Housing Unit (ADMAX SHU)] as a matter of policy until [cross-petitioner] COOKSEY issued a memorandum approving their release to general popula-

tion." Pet. App. 167a-168a. Plaintiff alleges that "COOKSEY directed that all detainees 'of high interest' be confined in the most restrictive conditions possible until cleared by the FBI," and that cross-petitioner "SAWYER was aware of and approved of the policies enunciated by * * * COOKSEY with regard to the confinement of detainees 'of high interest' in BOP facilities." *Id.* at 168a. Plaintiff also alleges that Sawyer, Rardin, Cooksey, and other high-level officials "willfully and maliciously designed a policy whereby individuals such as Plaintiff[] were arbitrarily designated to be confined in the ADMAX SHU without providing any individual determination as to whether such designation was appropriate or should continue." *Id.* at 173a.

Plaintiff alleges that he was subjected to unreasonable, unnecessary, and extreme strip and body-cavity searches, and that cross-petitioners, among others, "willfully and maliciously approved of, endorsed, and/or ordered that these searches take place" and "knew of, condoned, and willfully and maliciously agreed to subject Plaintiff[] to unreasonable, unnecessary and extreme strip and body-cavity searches." Pet. App. 182a. Plaintiff alleges that cross-petitioners also knew or should have known of an unlawful custom and practice in the MDC of imposing unreasonable and extreme strip and body-cavity searches, and that they acted with deliberate indifference and/or reckless disregard by failing to prevent their subordinates from conducting unreasonable, unnecessary, and extreme strip searches. *Id.* at 182-183a.[3]

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[3] Plaintiff also alleges that Sawyer "knew of and condoned" substantial restrictions on his right to communicate with counsel, Pet. App. 187a, but he did not name Sawyer in his Sixth Amendment claim. *Id.* at 196a-197a.

Plaintiff also alleges that he was subject to various types of mistreatment by lower-level BOP officials, and that cross-petitioners, among others, "knew of, condoned, and willfully and maliciously agreed to subject Plaintiff[] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." Pet. App. 172a-173a.

In total, plaintiff has brought nine causes of action against cross-petitioner Sawyer and eight causes of action against cross-petitioners Cooksey and Rardin. Plaintiff alleges that all three cross-petitioners violated his right to procedural due process by subjecting him to extreme and restricted conditions of confinement "in an arbitrary and unreasonable manner, without any defined criteria, contemporaneous review, or process of any sort." Pet. App. 193a (Claim 2). Plaintiff alleges that Sawyer violated the Fourth Amendment by "willfully and maliciously adopting, promulgating, failing to prevent, failing to remedy, and/or implementing the policy and practice under which Plaintiff[] [was] repeatedly subjected to unreasonable and unjustified strip and body-cavity searches." *Id.* at 199a-200a (Claim 9). He alleges that all three cross-petitioners engaged in unlawful religious discrimination in violation of the First Amendment "by adopting, promulgating, failing to prevent, failing to remedy, and/or implementing a policy and practice of imposing harsher conditions on confinement on Plaintiff[] because of [his] sincere religious beliefs." *Id.* at 201a (Claim 11). He alleges that all three cross-petitioners also engaged in unlawful racial discrimination in violation of the Equal Protection Clause "by adopting, promulgating, failing to prevent, failing to remedy, and/or implementing a policy and practice of imposing harsher conditions of confinement on Plaintiff[] because of [his] race." *Id.* at 202a (Claim 12). He claims that all three cross-petitioners vio-

lated the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb-1, by "imposing harsher conditions of confinement" on him "because of [his] sincere religious beliefs." Pet. App. 203a (Claim 13). In the claims that are most relevant to the cross-petition, plaintiff also alleges that all three cross-petitioners are liable for conspiracy to commit religious and racial discrimination under 42 U.S.C. 1985(3), as a result of their alleged "agreement to subject Plaintiff[] to unnecessarily harsh conditions of confinement in ADMAX SHU without due process of law," as well as their alleged agreement "to subject Plaintiff[] to unnecessary and extreme strip and body-cavity searches as a matter of policy." Pet. App. 206a-207a (Claim 16), 208a-209a (Claim 17). Finally, plaintiff alleges that all three cross-petitioners are liable under the Alien Tort Statute (ATS), 28 U.S.C. 1350, for violation of "customary international law prohibiting cruel, inhuman or degrading treatment." *Id.* at 213a (Claim 21).

3. The district court dismissed some but not all of plaintiff's claims against cross-petitioners. The court held that the procedural-due-process claim, Claim 2, survived dismissal because plaintiff had a protected interest in not being confined in highly restrictive conditions for longer than ten months and that the reasonableness of the defendants' conduct could not be determined on a motion to dismiss. Pet. App. 109a-113a. The district court also declined to dismiss the claim on qualified-immunity grounds, reasoning that there were "factual disputes concerning the nature of the defendants' actions and the need for those actions in light of the investigative and security concerns at the time." *Id.* at 115a. The court concluded that allegations of the personal involvement of high-level defendants, including the cross-petitioners as well as petitioners Ashcroft and Mueller, were sufficient at the motion to dismiss stage

when viewed in the context of the aftermath of the September 11th attacks. *Id.* at 116a-118a.

The district court dismissed the Fourth Amendment claim against the cross-petitioners, Claim 9, on the grounds that plaintiff had failed to allege adequately their personal involvement in the challenged searches. Pet. App. 130a-131a.[4] The district court also dismissed the claims against all three cross-petitioners for racial and religious discrimination, Claims 11 and 12, on the ground that plaintiff had not alleged that they were involved in the allegedly discriminatory classification of plaintiff as being "of interest" to the ongoing terrorist investigation. *Id.* at 136a-137a.

The district court dismissed the RFRA claim against cross-petitioners, Claim 13, on qualified-immunity grounds, holding that it was not clearly established at the time of the events at issue that RFRA applied to federal officials. Pet. App. 137a-142a. It also dismissed the ATS claim, Claim 21, holding that the United States was properly substituted as the defendant under the Federal Tort Claims Act, 28 U.S.C. 2679(b), and that the United States had not waived its sovereign immunity for a lawsuit for money damages for violation of international law. Pet. App. 146a-149a.

The district court declined to dismiss the conspiracy claims against cross-petitioners, Claims 16 and 17, except to the extent they were based on their actions in subjecting the plaintiff to strip and body-cavity searches. Pet. App. 145a. The district court noted that the plaintiff had not

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[4] The district court noted that it was unclear whether the Fourth Amendment claim was brought only against Sawyer, or also against Cooksey and Rardin. See Pet. App. 131a n.24. As to all three cross-petitioners, however, the district court held that the allegations failed to establish sufficient personal involvement to state a valid claim. See *id.* at 130a-131a & n.24.

sufficiently alleged the personal involvement of the cross-petitioners in those alleged constitutional violations. *Ibid.*

Accordingly, following the district court's order, the claims remaining against the cross-petitioners were Claim 2, for violation of procedural due process, and Claims 16 and 17, for conspiracy to violate plaintiff's civil rights, but only to the extent those conspiracy claims were predicated on an alleged agreement to violate the plaintiff's right to procedural due process.

4. Various defendants, including cross-petitioners, filed appeals from the district court's partial denial of their motions to dismiss the claims against them on grounds of qualified immunity. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings. Pet. App. 1a-70a.

The court of appeals held that the procedural due process claim, Claim 2, should be dismissed on qualified-immunity grounds, because reasonable government officials could legitimately question "whether the Due Process Clause required administrative segregation hearings or any procedures other than the FBI's clearance system." Pet. App. 43a-46a.

The court of appeals upheld the other claims at issue on appeal, including a substantive-due-process claim, Pet. App. 46a-50a; an excessive force claim, *id.* at 50a; a claim of interference with plaintiff's right to counsel, *id.* at 51a; a claim of violation of the Fourth Amendment through unreasonable and unnecessary strip and body-cavity searches, *id.* at 51a-56a; interference with religious practices in violation of the First Amendment, *id.* at 56a-58a; and race and religious discrimination claims, *id.* at 58a-63a. None of those claims were brought against cross-petitioners—a point that the court of appeals explicitly noted with reference to the

discrimination claims (calling cross-petitioners the "BOP Defendants"), *id.* at 59a & n.12.

The court of appeals also upheld the conspiracy claims brought under 42 U.S.C. 1985(3), rejecting arguments that they were barred by qualified immunity because it was not clearly established that federal officials were subject to liability under Section 1985(3) and that the allegations of conspiracy were too conclusory to state a valid claim for conspiracy. Pet. App. 63a-65a. On the second point, the court of appeals reviewed the allegations under "the normal pleading rules previously discussed" in its analysis of the alleged constitutional violations, holding that under those standards "Plaintiff's allegations of a conspiracy to discriminate on the basis of ethnicity and religion suffice to withstand a motion to dismiss." *Id.* at 65a. The court of appeals did not address in any manner the specific allegations against cross-petitioners that were the basis for the conspiracy claims against them.

The court of appeals denied motions for rehearing or rehearing en banc filed by plaintiff and by two different sets of defendants. Pet. App. 151a-152a. Cross-petitioners did not seek rehearing or rehearing en banc.

ARGUMENT

The cross-petition for a writ of certiorari should be held for disposition after the petition in No. 07-1015.

1. As described above, the conspiracy claims brought against cross-petitioners were based on their alleged agreement to deprive plaintiff of procedural due process, to subject plaintiff to unnecessary and extreme strip and body-cavity searches, and to discriminate against him on the basis of his race and religion. The district court dismissed the claims that cross-petitioners violated plaintiff's Fourth Amendment rights by subjecting him to unnecessary and

extreme strip and body-cavity searches, holding that there were inadequate allegations to establish cross-petitioners' personal involvement. Pet. App. 130a-131a & n.24. It also dismissed the conspiracy claims against cross-petitioners to the extent they were based on an alleged agreement to subject plaintiff to strip and body-cavity searches. *Id.* at 145a-146a. Furthermore, the district court dismissed the claims brought against cross-petitioners for racial and religious discrimination, Claims 11 and 12, on the ground that plaintiff's allegations did not show any personal involvement by cross-petitioners in the allegedly discriminatory classification of plaintiff as being "of interest" to the terrorist investigation. *Id.* at 136a-137a.

Once the case was before the court of appeals, therefore, the only remaining direct claim against cross-petitioners was for violation of procedural due process, and the only remaining conspiracy claim was based on cross-petitioners' alleged agreement to violate plaintiff's procedural-due-process rights. The court of appeals held that the procedural-due-process claim should be dismissed, on the ground that it was barred by qualified immunity. Pet. App. 43a-46a.

Cross-petitioners argue that the court of appeals erred in failing to require dismissal of the claim under 42 U.S.C. 1985(3) for conspiracy to violate plaintiff's procedural-due-process rights, once that court had already held that the allegations of a direct constitutional violation were inadequate to overcome qualified immunity. Cross-Pet. 16, 22. Furthermore, cross-petitioners assert that the conspiracy claim could not have been predicated on an alleged agreement to commit unlawful strip and body-cavity searches or to unlawfully discriminate against plaintiff by selecting him as a detainee "of interest" to the terrorist investigation on the basis of his race or religion. Cross-Pet. 19. Because the district court had previously held that the allegations

against cross-petitioners were inadequate to establish their personal involvement in those alleged constitutional violations, cross-petitioners argue that the same allegations were inadequate to support a claim for unlawful conspiracy. Cross-Pet. 17-18.

2. The question presented in the conditional cross-petition was not raised in the court of appeals, nor did that court explicitly resolve it in affirming in part the decision of the district court. The court of appeals may have believed that its conclusion that respondent's allegations were inadequate for purposes of stating a claim of a *direct* constitutional violation sufficient to overcome qualified immunity effectively disposed of plaintiff's conspiracy claim based on the same conduct, or the court's failure to address this issue may have been inadvertent. Nevertheless, it would be error to allow the conspiracy claims against cross-petitioners to proceed when the court of appeals properly recognized that the claims of a direct constitutional violation of plaintiff's right to procedural due process were defective. Such a result would allow plaintiffs to use Section 1985(3) as a means of circumventing the pleading and qualified-immunity standards that protect government officials from having to expend their time and resources in defending against meritless litigation.

In any event, to the extent that the conspiracy claims against cross-petitioners are still alive, the disposition by this Court of other claims against petitioners Ashcroft and Mueller may shed light on the pleading and qualified immunity standards governing the proper disposition of the Section 1985(3) conspiracy claims against cross-petitioners. Accordingly, if this Court grants a writ of certiorari in No. 07-1015, it should hold the cross-petition pending the disposition of No. 07-1015 and dispose of it in accordance with its decision in No. 07-1015.

CONCLUSION

The cross-petition for a writ of certiorari should be held for disposition after the petition in No. 07-1015.

Respectfully submitted.

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